Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

~~77-1~~1130

JASPER FRANK POTTS - - - - **Appellant**

versus

COMMONWEALTH OF KENTUCKY - - **Appellee**

On Appeal From Court of Appeals of Kentucky

MOTION TO DISMISS OR AFFIRM

ROBERT F. STEPHENS
Attorney General

MILES H. FRANKLIN
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Appellee

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3281, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

JASPER FRANK POTTS - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - *Appellee*

ON APPEAL FROM COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of Kentucky on the ground that it is manifest that the issue on which the decision of the case depends does not present a substantial federal question.

STATEMENT OF THE QUESTION PRESENTED

Whether the Question in the Instant Case Raises a Substantial Federal Question Under the Due Process Clause of the Fifth and Fourteenth Amendments So As to Warrant Review by This Court?

I.

THE STATE RULES OF CRIMINAL PROCEDURE INVOLVED AND THE NATURE OF THE CASE.

A. The Kentucky Rules of Criminal Procedure.

Appellant tells us that he is contesting the constitutional validity of two Kentucky Rules of Criminal

Procedure, hereinafter cited as RCr, 10.06 and 12.54. They are correctly set forth in Appellant's Brief at pages 3-4. Contrastingly, appellee is of the opinion that another procedural prerequisite, RCr 11.42, has been overlooked by appellant. RCr 11.42 is found in Appellee's Appendix "A". RCr 11.42 is the procedural method of attacking the degree of assistance rendered by trial counsel and of raising this allegation before the trial court. The overall effect of RCr 11.42, pertaining to post conviction relief, is to allow a prisoner in custody, who is found guilty and sentenced to imprisonment within the Commonwealth of Kentucky, to collaterally attack the validity of the judgment through the procedure outlined.

RCr 9.22 is of corollary importance and is found at Appellee's Appendix "B".

It should be pointed out that these criminal rules were judicially promulgated to govern procedure and practice in all criminal proceedings and are intended to provide a just determination of every criminal action.

B. The Proceedings Below.

Appellant was convicted of the offense denounced by Kentucky Revised Statute 435.100(1)(b), carnal knowledge of a female of the age of twelve years and under sixteen. He was convicted and sentenced to twelve years of imprisonment. The unreported opinion from the Court of Appeals of Kentucky, No. 76-257, affirming the conviction of Jasper Frank Potts is correctly set forth in Appellant's Appendix at pages

11-13 of his appeal. Because the assertion set forth by appellant concerns only whether defense counsel (a different lawyer than the one who prosecuted the appellate stages in the Kentucky Courts and this appeal) rendered effective assistance at the trial level, the appellee does not deem it necessary to enumerate the evidentiary testimony that resulted in Mr. Potts' conviction. Mr. Potts' Brief on Appeal has charged his defense counsel with ineffective assistance of counsel in that: he failed to seek a bill of particulars in reference to the indictment; he spent an inadequate amount of time in interviewing Mr. Potts and investigating the whereabouts of certain defense witnesses enumerated by Mr. Potts; that he failed to adequately impeach the prosecutrix on the basis of her previous testimony at the preliminary hearing; and that he failed to submit appropriate jury instructions.

In its Opinion affirming the conviction of Mr. Potts, the Kentucky Court of Appeals disposed of Mr. Potts' allegation that he was not afforded effective assistance of counsel by stating:

> The issue of ineffective assistance of counsel has not been presented to the trial court and cannot be raised for the first time in this Court.

Mr. Potts sought discretionary review in the Supreme Court of Kentucky pursuant to Kentucky Rules of Appellate Procedure 1.180, which allows the Kentucky Supreme Court to review a decision of the Kentucky Court of Appeals as a matter of sound discretion and where there are specific reasons why the judgment

should be reviewed. The Kentucky Supreme Court, in an unreported Opinion, #SC-361-D, found at page 14 of Appellant's Appendix, denied such review, thus affirming the Kentucky Court of Appeals decision.

Mr. Potts' appellate counsel, retained subsequent to the expiration period for motion for new trial (RCr 10.06), asserts that the intermediary appellate court erroneously refused to consider the issue of whether defense trial counsel rendered effective assistance. It is further argued that because no trial attorney would challenge his own effectiveness at the trial level, therefore appellant has no forum, save on direct appeal, to litigate the issue unchallenged by the defense attorney as to his own effectiveness.

II.

JURISDICTION

Appellant's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of 28 U.S.C. §1257(2), the proper provision for review of a state statute that has been drawn in question in a criminal case on appeal. Appellant premises his appeal upon a challenge to the constitutional validity of two RCrs, 10.06 and 12.54, and their application as stated in *Caslin* v. *Commonwealth,* Ky., 491 S. W. 2d 832, 834 (1973), wherein it was stated:

> Another assignment of error is that appellant had inadequate legal representation. He cites several examples to support his contention. The

> question of inadequacy of counsel was never presented in the lower court. This is not an error therefore that is reviewable on direct appeal. This court is exclusively a reviewing court except in original cases authorized by . . . the Kentucky Constitution. . . .

Appellee respectfully disagrees with appellant's contention and submits that this appeal should be denied because of the fact that where a federal question is initially raised in the highest state court, which refuses to consider any issue not presented to the trial court, the jurisdiction of the Supreme Court cannot attach, *Bailey* v. *Anderson,* 326 U. S. 203, 207 (1945). Only if the highest state court considers and disposes of the question so raised, can Supreme Court review be obtained.

The jurisdictional requirement relative to raising of a substantial federal question is formalized in subsection (2) of §1257 as being the validity of a state statute "drawn in question." Thus this phrase "drawn in question" refers to the raising of a substantial federal question in the correct manner, and the proper method of raising the federal question is dependent upon the state procedural practice, particularly where the litigant has a reasonable opportunity to have such an issue heard and determined. Generally the litigant must follow the state procedures in raising a federal question and it must be presented to the trial court at the point considered appropriate under state procedure. *Williams* v. *Georgia,* 349 U. S. 375, 382-3 (1955); thus if a reasonable state procedural require-

ment is not observed, the Supreme Court will decline to exercise jurisdiction both where the highest state court expressly refuses to decide the federal question for this procedural reason and where the highest state court is completely silent on the federal question. This being so, the respondent submits that the petitioner has failed to establish a jurisdictional basis. Therefore this appeal should be denied because it fails to meet the jurisdictional requirements of 28 U.S.C. 1257(2).

The appellee will now endeavor to respond to the above contention that appellant was denied the opportunity to litigate the issue of effective assistance counsel as though this issue were before the Court, even though appellee maintains it is not.

III.

ARGUMENT

The Issue Raised in the Instant Case Does Not Present a Substantial Federal Question Under the Due Process Clause of the Fifth or Fourteenth Amendments.

In *Powell* v. *Alabama,* 387 U. S. 45 (1932), this Court held that the right to counsel under the Sixth Amendment as applied through the due process clause of the Fourteenth Amendment meant "the effective assistance of counsel." The claim of convicts that their trial defense counsel was ineffective or incompetent is a familiar one to trial judges and appellate courts. Such claims asserted in motions for a new trial (RCr 10.06), in direct appeals (RCr 12.54), in collateral proceedings to vacate judgment (RCr 11.42), or in federal

habeas corpus review, have been made with increasing frequency in the years since the Supreme Court in *Powell, supra,* interpreted the adjective "effective" in the Sixth Amendment's requirement of "the assistance of counsel." The inadequate representation claim has a number of modifications: (1) the convict's natural inclination to utilize hindsight, sharpened by disappointment and nutured by ample time for contemplation, in assessing his trial defense counsel's performance; (2) the convict's second thoughts concerning his plea of guilty and the advice of counsel which lead to it, and (3) constructing a foundation for collateral attack upon conviction. Since the drawing of federal petitions for writs of habeas corpus and state petitions for post conviction relief based upon collateral attack have become a popular indoor activity in penal institutions, the hindsight motivation has been the principle one behind claims of ineffective representation. Jailhouse lawyers are not however the only ones to second guess trial defense counsel. The practice is not surprisingly prevalent where the convict has secured post trial counsel to survey the languishing dilemma. The question has been then how do courts determine what is and is not effective assistance of counsel?

A state prisoner in custody who is found guilty and sentenced to imprisonment within the Commonwealth of Kentucky may collaterally attack the validity of the judgment through the procedure outlined in RCr 11.42. A principal ground that could be raised on an RCr 11.42 is that the defendant had ineffective assistance of counsel at his trial. The defendant cannot set aside a

judgment through a collateral attack by raising mere errors at trial. Errors that were committed at trial which might have been raised on appeal will not be grounds for setting aside the judgment at a later time unless such errors are a violation of constitutional rights; *King* v. *Commonwealth,* Ky., 387 S. W. 2d 582 (1965). The defendant in order to obtain relief under RCr 11.42 must show a violation of a constitutional right or lack of jurisdiction or such a violation of a statute that would make the judgment void; *Lay* v. *Commonwealth,* Ky., 506 S. W. 2d 507 (1974). Thus, unless an appellant makes known to the trial court his complaint of ineffective legal assistance either during the proceedings below or as grounds for a motion for a new trial then that argument is not preserved for appellate review. RCr 9.22. The Supreme Court of Kentucky has most recently enunciated this principal in *Foster* v. *Commonwealth,* Ky., 507 S. W. 2d 443, 445-446 (1974) wherein it was stated:

> Foster filed a supplemental brief, pro se, in which he claims ineffective assistance of his trial counsel (a different lawyer than the ones prosecuting this appeal.) The trial court was not made aware of this complaint during the trial nor was this contention contained in the motion for a new trial, therefore this ground was not preserved for appellate review. RCr 9.22. . . .

Because the question of inadequacy of counsel was never presented to the Kentucky trial court, this issue is not reviewable on direct appeal to a Kentucky appellate court, the latter being exclusively a reviewing

court except in certain specialized cases authorized under the Kentucky Constitution. It is patently obvious that the sole question asserted by appellant has never been raised collaterally, preserved, or passed upon in the state courts below.

It was very early established that this Court will not decide constitutional issues raised here for the first time pertaining to state court decisions. In a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes and procedural rules in light of a constitutional challenge since the statutes and procedural rules may be construed in a way which saves their constitutionality or the issue may be blocked by an adequate state ground. Not only is this appeal improvident, it is not subject to review by this Court by way of appeal pursuant to 28 U.S.C. 1257(2). *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969); *DeBacker* v. *Brainard,* 396 U. S. 28 (1969).

IV.

CONCLUSION

The issue presented by the appellant alleging a denial of the issue of effective assistance of counsel has not been pursued pursuant to RCr 11.42. Thus the appellant has failed to meet the jurisdictional requirements, 28 U.S.C. 1257(2). Wherefore, appellee submits that the question upon which this cause depends is so unsubstantial as not to need any further argument, and appellee respectfully moves the Court to dismiss

this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeals of Kentucky.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General

MILES H. FRANKLIN
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Counsel for Appellee

CERTIFICATE OF SERVICE

I, MILES H. FRANKLIN, counsel for appellee, hereby certify that the foregoing Motion to Dismiss or Affirm was served on appellant by depositing three copies each of same in the United States mail, first class postage prepaid, this ____ day of _____, 1978, addressed to counsel for appellant, HON. GARIS L. PRUITT, P. O. Box 405, Ashland, Kentucky 41101.

MILES H. FRANKLIN
Assistant Attorney General
Office of the Attorney General
Capitol Building
Frankfort, Kentucky 40601

Appendix

APPENDIX "A"

Rule 11.42. Motion to vacate, set aside or correct sentence.—(1) A prisoner in custody under sentence who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court which imposed the sentence to vacate, set aside or correct it.

(2) The motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

(3) The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

(4) The clerk of the court shall notify the attorney general and the commonwealth's attorney in writing that such motion (whether it be styled a motion, petition or otherwise) has been filed, and the commonwealth shall have 20 days after the date of mailing of notice by the clerk to the attorney general in which to serve an answer on the movant.

(5) Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and is financially unable to employ counsel, shall appoint counsel to represent him in the proceeding, including appeal.

(6) At the conclusion of the hearing or hearings the court shall make findings determinative of the material issues of fact and enter a final order accordingly. If it appears that the movant is entitled to relief, the court shall vacate the judgment and discharge, resentence, or grant him a new trial, or correct the sentence as may be appropriate.

(7) Either the movant or the commonwealth may appeal from the final order or judgment of the trial court in a proceeding brought under this rule.

(8) The final order of the trial court on the motion shall not be effective until expiration of time for notice of appeal under RCr 12.54 and shall remain suspended until final disposition of an appeal duly taken and perfected.

(9) Counsel appointed for the movant under this rule shall be entitled to reimbursement by the commonwealth for his reasonable expenses of travel and subsistence for necessary conferences with the movant at his place of confinement, provided that each trip made for that purpose be authorized in advance thereof by order of the trial court.

(10) Original applications for relief of the nature described in this rule that are addressed directly to a court other than the one in which the sentence was imposed shall be transmitted to the court in which the sentence was imposed for further disposition in the manner above set forth. (Amended September 23, 1964, effective January 1, 1965; amended September 8, 1969, effective January 1, 1970; amended June 16, 1970, effective September 1, 1970; amended June 18, 1976, effective July 1, 1976.)

APPENDIX "B"

Rule 9.22. Objections, exceptions unnecessary.—Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, and on request of the court, his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.